In the

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.———

H. W. FERGUSON, *Petitioner*,

vs.

THE UNITED STATES OF AMERICA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

The Honorable Circuit Court of Appeals entirely misunderstood the point in your petitioner's request for an instructed verdict.

The Court said:

> "There is no merit in the contention that the Court erred in refusing to instruct the jury to return a verdict of not guilty. * * * On all the evi-

dence Ferguson was not entitled to an instructed verdict of not guilty."

The rule that a conflict in the testimony is a question exclusively for the jury and that a Federal Appellate Court will not inquire into or measure the weight of the conflicting evidence is elementary; and had the vital issue in the case, viz: was the land from which all the monies were derived the property of the Bank depended upon whether Ferguson or McCombs were telling the truth, Ferguson was not entitled to an instructed verdict.

But facts proven in the case were (1) the custom of the Bank where a borrowing land owner was in default and financially unable to meet his obligation and there was no alternative but for the Bank to take over the security, was to have a deed made by said land owner to a clerk in the Bank who would hold title for the Bank; (R. 411); (2) In the instant case, the deed from the borrowing land owner was not made to a clerk in the Bank; but was made to S. K. Fowler, a farmer on a large scale living in the County where the land lay, who was in no way connected with the Bank, (R. 83); (3) Where title was taken in the name of a clerk in the Bank to hold for the Bank the universal rule, for the protection of the Bank, was for the clerk to simultaneously execute a deed to the land to the Bank; upon which the loan record in the Bank of the borrower was closed and the land put into the real estate account (R. 53-412); (4) In the instant case,

no deed was prepared for Fowler, conveying the land to the Bank; and no deed was ever executed by Fowler conveying title to the Bank; the Berkman loan record in the Bank was not closed; nor was the Berkman land put into the real estate account in the Bank, (R. 302-303-304-305); (5) McCombs, the attorney who handled the Berkman-Fowler transaction for the Bank and who received from Mrs. Berkman's attorney the deed which she had executed to Fowler, by letter, dated April 5th, 1937, transmitted said deed to H. W. Ferguson personally, with the inquiry, "if either you or Mr. Fowler wants an opinion from me as to *his title*, please let me know so I may order the necessary documents and have them filed for record in Nueces County and included in a supplement." (R. 56); (6) On the same day, April 5, 1937, McCombs wrote to the Bank enclosing Mrs. Berkman's check for $1000.00; a release to be executed by the Bank to Mrs. Berkman of all personal liability; and concluding "*The title to this property is now vested in S. K. Fowler, Corpus Christi, Texas, subject to the lien in favor of the Bank.*" (R. 36-37); (7) The clerks in the Bank upon receipt of this letter and upon its authority noted on the loan record "Change of ownership Mrs. Carrie Berkman to S. K. Fowler, Corpus Christi, Texas." (R. 371-302-303-304-305); (8) McCombs, a witness for the government, admitted under oath that in July, 1938, he stated to one John Pope, an attorney, in the presence of Pool, the Secretary of the Bank, "I know all about that transaction. I han-

dled the whole thing, and I know that the deed to Fowler was not made in trust for the Bank". And that a week later, in the presence of Ferguson, he stated to the same John Pope that "He knew all about the Berkman transaction; that he had handled the whole thing; that the Bank had no interest in the land; and that Fowler was not holding it as trustee for the Bank". (R. 262-265). (9) The release from the Bank to Mrs. Berkman prepared by this same McCombs provided; "But with the distinct understanding and agreement that said note (the Berkman note for $9600.00) shall remain in full force and effect and the lien securing same shall remain in full force and effect". (R. 39). (10) The deed from Mrs. Carrie Berkman to S. K. Fowler also prepared by McCombs recited that it was made "subject to the balance due on that certain promissory note dated September 1st, 1925, in the principal sum of $9600.00, executed by Andrew Berkman and Carrie Berkman to the order of the Dallas Joint Stock Land Bank of Dallas . . . and fully described in a deed of trust of same date to H. W. Ferguson, Trustee, now of record in Nueces County, Texas, in Vol. 32, pp. 599-603; Deed of Trust Records; and subject to all unpaid taxes against the land." (R. 83). (11) In the deed from Fowler to Deutschman, Deutschman assumed the Berkman indebtedness. (R. 134). (12) Deutschman paid to the Bank the balance due on the Berkman note, principal and interest, in January, 1938. (R. 135).

This evidence being all uncontroverted, constituted facts proven in the case, from which it followed, as a

matter of law, that the land did not belong to the Bank before Mrs. Berkman deeded the same to Fowler, and did not become the property of the Bank by her deed to S. K. Fowler March 30th, 1937. On that date the Berkman note and the lien on the land securing the same were in full force and effect. By express provision in the release from the Bank to Mrs. Berkman, in the deed from Mrs. Berkman to Fowler; and in the deed from Fowler to Deutschman, said Berkman note and the lien on the land securing the same were kept in full force and effect until the balance of the note was paid off in full by Deutschman in January, 1938. During this time the interest of the Bank in the land was that of a lienholder to secure a loan of money made by the Bank to the owner of the land.

Had the land become the property of the Bank by the deed from Mrs. Berkman, the fee owner, to Fowler, its title as lienholder would have become merged in its fee ownership of the land—would have been extinguished —would have ceased to exist—according to an elementary rule of real estate law that where the owner of a lesser estate in land acquires a greater estate in the same land the lesser estate is merged in the greater.

Facts proven in this case were that the Bank's title as a lienholder in the land was not extinguished—did not cease to exist—but was kept alive and in full force and effect.

The proposition of the government that the Bank, by the deed from Mrs. Berkman to Fowler, became the fee owner of the land and at the same time continued to be the owner and holder of a deed of trust lien on the same land in full force and effect securing a note in full force and effect payable to itself, is a legal absurdity.

In view of the foregoing facts proven in the case, as a matter of law, the Berkman tract of land never was and never became the property of the Bank; and the conflict between the testimony of Ferguson and McCombs became immaterial. True, the testimony of Ferguson that he directed McCombs to have Mrs. Berkman execute a deed to Fowler for the benefit of Mrs. Ferguson was consistent with the uncontroverted evidence in the case; while the testimony of McCombs that Ferguson instructed him to have Mrs. Berkman make the deed to Fowler for the benefit of the Bank, was inconsistent with all of said evidence.

But This Court will not review the evidence.

Suffice it to say that McCombs' testimony was so contradicted by all the facts proven in the case; by his own letters, actions and conduct; and by his own admissions under oath, as to be of no probative force, and not entitled to go to the jury for its consideration.

The District Judge erred in refusing to instruct the jury to return a verdict of not guilty. The Circuit Court of Appeals erred in holding; "On all the evidence

Ferguson was not entitled to an instructed verdict of not guilty."

II.

Likewise The Circuit Court of Appeals wholly misconceived the import and effect of the District Court's entire charge when it said:

> "The appellant complains that the Court again committed reversible error in its instructions to the jury and that the erroneous instructions adverted to in our former opinion were in effect and substance given to the jury on the second trial. At the request of the defendant the Court gave two special charges which stated the issues in a light most favorable to Ferguson. We have carefully read and considered the entire charge of the Court and have found that it contains no error prejudicial to the rights of this appellant."

The two requested special charges referred to were (1) a charge on good faith, and (2) one that it was incumbent on the government to prove beyond a reasonable doubt that at the time the land in question went into the name of Fowler that it was H. W. Ferguson's intent and purpose that the same should at the time be henceforth held by him as trustee for the land bank. (R. 474).

These requested special charges did not offset and cure the previous erroneous and prejudicial instructions in the Court's charge.

On the contrary, said erroneous and prejudicial instructions wholly nullified any benefit to your petitioner from said requested charges and rendered the same of no effect whatever.

The District Judge charged the jury

> First: "It appears from the uncontroverted facts in the case as set out in the indictment . . . the evidence shows or tends to show that the defendant Ferguson considered the land a fairly good prospect and accepted the proposition and accepted it in this form; that instead of conveying the land directly to the Bank it was to be conveyed to a person to be named by the Bank, called a nominee; that nominee was S. K. Fowler." (R. 463).

This same instruction was given to the jury by the same District Judge on the first trial of the case; and was condemned by this same Circuit Court of Appeals in the following language:

> "But we think the Court, impressed with Ferguson's accountability in equity as an agent and fiduciary of the Bank, erroneously made and refused charges on the critical question. In stating the uncontroverted facts he said that instead of conveying the land directly to the Bank they conveyed to a person to be named by the Bank called a nominee for the Bank. That nominee was S. K. Fowler. Thus in the very beginning the jury was told that Fowler took for the Bank and not for Ferguson." (112 Fed. (2d) 132).

> Second: "The defendant Ferguson was President of the Bank and as such was without power

to take anything that was the Bank's and name someone as trustee to hold for him personally or for his wife." (R. 465).

This identical instruction was given to the jury on the first trial by this same District Judge and was held erroneous by this same Circuit Court of Appeals in the following language:

> "This last sentence (Ferguson was without power to take anything that was the Bank's and name someone as trustee to hold for him personally or for his wife), while true of anything that was really the Bank's, would be understood in the connection in which it was spoken as meaning that the land before it was deeded to Fowler was the Bank's and Ferguson was therefore without power to make Fowler his trustee."

In reversing and remanding the case the Circuit Court of Appeals said:

> "While the charge in other parts of it submitted the vital issues to the jury we think the parts of it we have criticiser obscured them and tended to impress the jury with the idea that Ferguson's position of trust prevented any possibility of the land and the monies arising from it belonging to anyone but the Bank." (112 Fed. (2d) 132).

Third: The same United States District Judge on the present trial, in addition to repeating instructions which had been held erroneous by the Circuit Court of Appeals in this charge, reiterated language which had

been condemned by the Circuit Court of Appeals when he further instructed the jury:

> "One acting as President of a Bank is not *at liberty to deal with the property of the Bank as* though it were his own . . . And if the President of a Bank fails in the performance of this duty and *uses opportunities that come before him to appropriate* the *proceeds of property rightfully belonging* to the Bank then the Bank acting through the directors and stockholders could at its election hold the President liable in equity for any profits he made *in thus dealing personally in a matter in which he should have dealt for the Bank alone.*" (R. 468).

As stated by the Circuit Court of Appeals with reference to the preceding instruction, the jury could only have understood by this language in the connection in which it was used as meaning that the land before it was deeded to Fowler belonged to the Bank and that Ferguson was not at liberty to deal with it as though it were his own; that the proceeds of said land rightfully belonged to the Bank and that the Bank could hold him liable in equity for any profits which he made in dealing with the land personally when he should have dealt with the same for the Bank alone.

Fourth: The District Judge further told the jury that

> ". . . the defendant's intent to defraud the Bank was an indispensable element of each offense charged in the indictment. That it was a presumption of law that one intended the natural and

probable effect of the act he intentionally did. . . . that the defendant's testimony as to his intent and his explanation of his act and omission were competent and material evidence on the subject of his intent. That acts however were sometimes more persuasive evidence of intent than words. And that it was the jury's duty to consider all the evidence; all of the acts and omissions and doings of the defendant; that presumption that one intended the natural and probable effect of his act intentionally done." (R. 467-468).

This instruction following the instructions heretofore set out wherein the jury were told (1) that in the deed from Mrs. Berkman to Fowler, Fowler was the nominee of the Bank—held the land for the Bank; (2) That Ferguson as President of the Bank was without power to take anything that was the Bank's and name someone as trustee for himself personally or for his wife. (3) That Ferguson as President of the Bank was not at liberty to deal with the property of the Bank (the Berkman land), as though it were his own. (4) That if he did and appropriated the proceeds of property rightfully belonging to the Bank, the Bank could hold him liable in equity for any profits he had thus made.

Following these instructions the jury could only have understood by this instruction that Ferguson's act in directing that the deed from Mrs. Berkman be made to Fowler for the benefit of his wife; and that his act in collecting the proceeds from the land and paying the

same over to his wife instead of to the Bank were more persuasive evidence of his intent to defraud the Bank than any words he might say in explanation of his said acts.

Fifth: Finally the District Judge instructed the jury:

> "You are instructed in this connection that if the defendant Ferguson, knowing or believing that the Berkman land would probably result in yielding a profit over and above the indebtedness caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife rather than to the Bank, and that the use of Fowler's name and the manner in which it was handled was intended only as a subterfuge, then the defendant Ferguson when he received profits from such property, would be guilty of abstracting the same from the Bank. On the other hand if it was placed in Fowler's name in good faith and handled as a bona fide transaction and not as a subterfuge it would not be an act of abstracting money from the Bank." (R. 468).

The jury had just heard Ferguson testify that he considered it a good investment to put $1250.00 of his wife's money into the land subject to the Bank's indebtedness; necessarily he believed "that the Berkman land would probably result in yielding a profit over and above the indebtedness"; not only that but that the land would probably result in yielding a profit over and above the $1250.00 which he had put into it in addition to the indebtedness; and because of that

"he caused it to be handled in the name of Fowler for the purpose of realizing this profit personally and diverting it to his wife rather than to the Bank."

The jury could only have understood from this charge taken with the testimony of Ferguson that he was guilty of abstracting money from the Bank.

Of what avail was it to Ferguson that the District Judge, following these instructions which were equivalent to a pronouncement from the Bench, that he was guilty of abstracting money from the Bank, instructed the jury on "good faith" and "it was incumbent on the government to prove beyond a reasonable doubt that at the time the land in question went into the name of Fowler that it was H. W. Ferguson's intent and purpose that the same should at the time be henceforth held by him as trustee for the land bank"?

The record in this case shows that your petitioner was rough handled in his trial in the District Court. That the United States District Judge holding to the view that the President of a Joint Stock Land Bank organized and operating under the Federal Farm Loan Act who purchased with his wife's money from the fee owner of a tract of land incumbered with a lien in favor of the Bank to secure a loan, was guilty under Section 984, Title 12, U. S. C. of abstracting and embezzling monies from the Bank when he collected the proceeds resulting from the land and paid the same to his wife instead of to the Bank; the lien of the Bank

not having been endangered by the transaction but having been kept in full force and effect until the Bank's indebtedness was finally paid off in full principal and interest, erroneously gave to the jury instructions not only not warranted by but actually in conflict with the uncontroverted evidence; instructions which were contrary to elementary principles of corporation and land law; instructions which were a denial from the Bench of your petitioner's testimony to the jury; instructions which obscured, confused and misled the jury; instructions which could only have been understood by the jury as meaning that your petitioner was guilty of the offenses charged in the indictment and which prevented any possibility of a consideration by the jury of your petitioner's defense or even of his testimony given in aid of said defense; and finally, instructions which as said by the Circuit Court of Appeals on the former appeal "tended to impress the jury with the idea that Ferguson's position of trust prevented any possibility of the land and the monies arising from it belonging to anyone but the Bank". (112 Fed. (2d) 132).

The record shows that the jury by their verdict simply rubber stamped the verdict of guilty which had been pronounced by the District Judge.

The Honorable Circuit Court of Appeals erred when it said "We have carefully read and considered the entire charge of the Court and have found that it con-

tains no error prejudicial to the rights of this appellant."

The Honorable Circuit Court of Appeals in affirming the judgment of the District Court sanctioned an excessive, unjust and cruel sentence of eighteen months in the penitentiary and $10,000.00 fine, resulting from a construction of a Federal Penal Statute by the District Judge which was not warranted, and erroneous as applied to the acts of your petitioner which in every respect were legal as shown by this record.

III.

Wherefore, your petitioner respectfully submits that this case is one calling for the exercise by This Court of its supervisory powers by granting the Writ of Certiorari prayed for and thereafter reviewing and reversing the decision of the Circuit Court of Appeals.

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